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IN THE
COURT OF APPEALS OF INDIANA

IN RE THE MARRIAGE OF:	)	
ANN T. WARD,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 19A04-0606-CV-331
	)	
ANTHONY WARD,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE DUBOIS CIRCUIT COURT
The Honorable William E. Weikert, Judge
Cause No. 19C01-0403-DR-133

February 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Ann Ward ("Ann") appeals the inclusion of certain shares of her family's corporation in the marital estate. Ann argues the trial court erred when it found the shares were a gift from her father to her former husband, Anthony Ward ("Tony"). Although the certificates representing the shares were never delivered to Tony, the income tax returns the couple filed during their marriage indicated Tony owned 47 percent of the corporation's stock. Therefore, the trial court properly included the shares in the marital estate and we affirm.

FACTS AND PROCEDURAL HISTORY

Ann's great-grandfather founded the Joseph W. Gutzweiler Company, which owned and operated the Astra Theatre in Jasper for sixty-five years.[1] Ownership of the company remained in the Gutzweiler bloodline and eventually passed to Ann's father, Gerald Gutzweiler.

Ann and Tony married in 1989, and in 1992 they took over the operation of the Astra. In 1994, as part of his estate plan, Gerald began giving company stock to Ann and to Tony. Each stock certificate provided:

> This Certifies That [name] is the owner of Five (5) full paid and non assessable SHARES OF THE CAPITAL STOCK OF JOSEPH W. GUTZWEILER COMPANY, INC., transferable on the books of the Corporation in person or by duly authorized Attorney upon surrender of this Certificate properly endorsed.

(Wife's Ex. 16.) Attached[2] to each stock certificate was the following proviso:

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[1] The theatre ceased operations in 2001.

[2] The parties refer to this document as being either attached as a second sheet or printed on the back of each certificate. Because Gerald testified a buy and sell agreement that restricts sales of stock outside of

> Dec. 20, 1994
> TO WHOM IT MAY CONCERN:
>
> We have, this date, upon advice of our attorney, decided to make annual gifts of our stock holdings in Joe W. Gutzweiler Co., Inc.
>
> These gifts are of approximately $10,000 each so as to conform to the U.S. tax laws at this time.
>
> The gifts will be made to our daughter, Ann T. (Gutzweiler) Ward and her husband, Anthony E. Ward.
>
> Since it is our intention that these gifts be blood line [sic] in nature, the following requisite shall apply:
>
> > IN THE EVENT OF LEGAL DISSOLUTION OF THE MARRIAGE OF OUR DAUGHTER AND HER HUSBAND, ANTHONY E. WARD, THE SHARES GIFTED TO HIM WILL FOLLOW THE BLOOD LINE INTENT OF THE GIFTS. SAID SHARES ARE THEN TO BECOME EQUAL PROPERTY OF ANY CHILDREN RESULTING FROM THIS MARRIAGE.
> >
> > A copy of this covenant is to be attached to all gifted shares.
>
> /s/ Doris v. Gutzweiler /s/ Gerald J. Gutzweiler

(*Id.*)

Eventually, Ann owned 61 shares[3] and Tony owned the remaining 50 shares of the company. The couple's income tax returns reflected this ownership. Although Gerald kept Ann's stock certificates in a safe deposit box of which she was co-owner, he kept Tony's stock certificates locked in a drawer in his desk.[4] When Ann filed her dissolution petition on March 30, 2004, Gerald purportedly transferred all of Tony's shares to the Wards' two minor children in accordance with the bloodline restriction.

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the family appears on the back of each certificate, we conclude the restriction was attached to the stock certificates.

[3] Ann received 11 shares from her grandmother before her father began making gifts of the shares.

[4] These certificates were apparently kept with the corporation's books.

In dividing the marital estate, the trial court determined as follows:

> 18. JOSEPH W. GUTZWEILER CO., INC.
>
> In about the year 1992, the parties took over the business known as the Astra Theatre, which was owned by Joseph W. Gutzweiler Co., Inc. (the "Corporation"). According to the testimony of Wife's father, he began to divest himself of the stock in the corporation for estate tax planning purposes by the transfer of five shares annually to each of the parties. The incremental transfer of shares was done for the purpose of remaining under the annual federal gift tax exclusion limit, while at the same time reducing the value of his estate for estate tax purposes. The parties' income tax returns (Husband's Exhibit E) [sic] and financial statements (Husband's Exhibit C) [sic] reflect that the Wife ultimately became the owner of fifty-three percent (53%) of the stock in the corporation; the Husband forty-seven percent (47%). The Wife's father further testified that he maintained the records of the corporation, and at the time of the filing of the petition for dissolution by his daughter, he transferred all of the Husband's shares to the parties' children on the premise that transfer of the stock was restricted to his descendants. The Wife testified that the stock was owned by her and the children, and that she owned sixty-one (61) shares of stock in the corporation, while the children owned fifty (50) shares. According to the testimony of the Husband, he had no knowledge of the restriction on the transfer of the shares of stock nor the fact that his shares had been transferred from him to the children at the time of the filing of the petition for dissolution.
>
> * * * * *
>
> It is the Court's opinion that the gift of stock made by the Wife's father, as reflected in the parties' income tax returns during their marriage, was an unconditional, valid, enforceable gift. The conditions which the Wife's father attempted to place on these gifts, years later near the time the dissolution was filed, are of no force and effect and have no influence on the gifts.
>
> The Wife shall be declared the owner of the assets of the corporation, and the Wife shall pay the Husband 47% of the value of the corporation assets of $90,000.00 ($42,300.00).

(App. at 13-14.)

DISCUSSION AND DECISION

The disposition of marital assets is an exercise of the trial court's sound discretion. *Hatten v. Hatten*, 825 N.E.2d 791, 794 (Ind. Ct. App. 2005), *trans. denied* 841 N.E.2d

180 (Ind. 2005). We review for an abuse of discretion a claim that the trial court improperly divided marital property. *Id.* In doing so, we consider the evidence most favorable to the trial court's disposition, without reweighing the evidence or assessing the credibility of witnesses. *Id.* An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the trial court has misinterpreted the law or disregarded evidence of factors listed in the controlling statute. *Id.* Even if a different conclusion might be reached in light of the facts and circumstances, we will not substitute our judgment for that of the trial court. *Id.* When a trial court has entered findings of fact and conclusions of law, we first determine whether the evidence supports the findings of fact and then determine whether the findings of fact support the trial court's conclusions of law. *Cox v. Cox*, 833 N.E.2d 1077, 1079-80 (Ind. Ct. App. 2005).

The trial court must divide "the property of the parties, whether (1) owned by either spouse before the marriage; (2) acquired by either spouse in his or her own right: (A) after the marriage; and (B) before final separation of the parties; or (3) acquired by their joint efforts." Ind. Code § 31-15-7-4(a).

Relying on the couple's income tax returns, the trial court determined the corporation shares were "an unconditional, valid, enforceable gift," (App. at 14), from Gerald and, thus, properly included in the marital estate. Ann asserts the trial court erred by including Tony's corporation shares in the marital estate. Because the stock certificates were never delivered to Tony, Ann argues, the gift to Tony was incomplete and the corporation shares remained Gerald's property. Thus, she continues, the shares

were not the property of the parties and could not be included in the marital estate. We disagree.

A valid *inter vivos* gift occurs when 1) the donor is competent, 2) the donor intends to make a gift, 3) the gift is completed with nothing left undone, 4) the property is delivered by the donor and accepted by the donee, and 5) the gift is immediate and absolute. *Fowler v. Perry*, 830 N.E.2d 97, 105 (Ind. Ct. App. 2005). "Thus, once delivery and acceptance of a gift *inter vivos* occurs, the gift is irrevocable and a present title vests in the donee." *Id.* Ann focuses her argument on the undisputed fact the stock certificates were not delivered to Tony.

Although the stock certificates were not delivered to Tony, the trial court correctly concluded the ownership of the shares was transferred to Tony. Indiana "has long distinguished between shares of stock on the one hand and certificates of stock on the other." *DRW Builders, Inc. v. Richardson*, 679 N.E.2d 902, 906 (Ind. Ct. App. 1997) (shareholder derivative action), *reh'g denied*.

> A share of stock is defined as a proportional part of certain rights in the management and profits of the corporation during its existence, and in the assets upon dissolution. However, a certificate of stock is merely documentary evidence of title to shares of stock. Thus, possession of a share certificate is not essential to ownership of shares or to the exercise of shareholder's rights.

Id. A shareholder may prove ownership of shares by evidence other than that of the certificate. *Id.*

The trial court determined the couple's income tax returns during the marriage reflected Tony's ownership of corporation stock. For example, in 2001 Tony received a

Schedule K-1 (Shareholder's Share of Income, Credits, Deductions, etc.) from the Joseph W. Gutzweiler Co., Inc. The Schedule K-1 indicated his "percentage of stock ownership," (Father's Exhibit C),[5] was forty-seven percent and showed the amount of the corporation's income, loss, deductions, and depreciation attributable to his share. Ann received a Schedule K-1 from the corporation that indicated she owned fifty-three percent of the corporation's stock. The couple filed a joint individual income tax return in 2001 and, on Schedule E of that return, reported the various amounts as reflected on their Schedules K-1. This supports the trial court's finding Tony had an ownership interest in the corporation even though the stock certificates had never been delivered to him.

The trial court properly concluded the conditions Gerald attempted to place on the gifts were of "no force and effect and have no influence on the gifts."[6] (App. at 14.) A restriction on the transfer of shares must be "noted conspicuously on the front or the back of the certificate." Ind. Code § 23-1-26-8(b). "Unless so noted, a restriction is not enforceable against a person without knowledge of the restriction." *Id.* The trial court noted Tony testified he "had no knowledge of the restriction of the transfer of the shares of stock." (App. at 13.) "For a party to be bound by share transfer restrictions, that party must have notice of the restrictions." *F.B.I. Farms, Inc. v. Moore*, 798 N.E.2d 440, 446 (Ind. 2003). Because Tony did not have notice of the restriction, he cannot be bound by it and the restriction is of no effect.

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[5] Tony's exhibits are labeled "Father's Exhibit."

[6] The trial court also found the conditions were placed on the gifts "years later near the time the dissolution was filed." (App. at 14.) Because the conditions were dated December 20, 1994, nearly a decade before Ann sought a divorce, it is not clear what evidence supported this determination.

The trial court correctly concluded Gerald made gifts of corporation shares to Tony without restriction and it therefore properly included the shares in the marital estate. Accordingly, we affirm.

Affirmed.

NAJAM, J., and MATHIAS, J., concur.